

NOV 17 1983

No. 82-1795

CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA CITY, INC.;  
MULTIMEDIA CABLEVISION, INC.; AND SAMMONS  
COMMUNICATIONS, INC.,

*Petitioners,*

—v.—

RICHARD A. CRISP, DIRECTOR, OKLAHOMA ALCOHOLIC  
BEVERAGE CONTROL BOARD,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE TENTH CIRCUIT

**BRIEF OF AMICI CURIAE THE AMERICAN CIVIL LIBERTIES  
UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF  
OKLAHOMA IN SUPPORT OF PETITIONERS**

Of Counsel:

BURT NEUBORNE

CHARLES S. SIMS

The American Civil Liberties Union  
132 West 43rd Street  
New York, New York 10036  
(212) 944-9800

JOHN G. KOELTL\*

JAMES C. GOODALE

MARTHA J. OLSON

Debevoise & Plimpton  
875 Third Avenue  
New York, New York 10022  
(212) 909-6000

Attorneys for the American Civil  
Liberties Union and the  
American Civil Liberties Union  
of Oklahoma, *amici curiae*

November 17, 1983

\*Counsel of Record for  
*amici curiae*

## TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES .....	iii
INTEREST OF AMICI CURIAE .....	1
STATEMENT OF THE CASE .....	2
SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	7
I. THE FIRST AND FOURTEENTH AMENDMENTS BAR OKLAHOMA FROM REGULATING PRIVATE CONDUCT BY IMPOSING A BLANKET BAN ON THE DISSEMINATION OF INFORMATION ABOUT A LAWFUL ACTIVITY .....	7
II. THE OKLAHOMA BAN FAILS THE REQUIREMENTS OF THE FIRST AND FOURTEENTH AMENDMENTS THAT ANY REGULATION OF COMMERCIAL SPEECH BE DIRECTLY RELATED TO A SUBSTANTIAL GOVERNMENT INTEREST AND BE NO MORE EXTENSIVE THAN NECESSARY TO MEET THAT INTEREST .....	9
A. Oklahoma's Interest in Temperance is Neither Substantial Nor Directly Advanced By Its Ban on Wine Advertisements .....	11
B. Oklahoma's Advertising Ban Is More Extensive Than Necessary To Fulfill Any Interest in Temperance .....	12

III. THE TWENTY-FIRST AMENDMENT DOES NOT OVERRIDE THE PETITIONERS' FIRST AND FOURTEENTH AMENDMENT IN- TERESTS IN CARRYING ADVERTISEMENTS FOR WINE.....	14
CONCLUSION.....	17

## TABLE OF AUTHORITIES

Cases	PAGE
<i>Associated Press v. United States</i> , 326 U.S. 1 (1945) . . .	7
<i>Bigelow v. Virginia</i> , 421 U.S. 809 (1975) . . . . .	8, 10
<i>Bolger v. Youngs Drug Products Corp.</i> , 103 S. Ct. 2875 (1983) . . . . .	10
<i>Cable-Com General, Inc. v. Crisp</i> , Civ.-81-290-W (W.D. Okla. Feb. 10, 1982) . . . . .	3, 4, 5
<i>California v. LaRue</i> , 409 U.S. 109 (1972) . . . . .	16
<i>California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.</i> , 445 U.S. 97 (1980) . . . . .	14, 15
<i>Central Hudson Gas &amp; Electric Corp. v. Public Service Commission</i> , 447 U.S. 557 (1980) . . . . .	4, 5, 8, 10, 11, 12, 13, 14
<i>Consolidated Edison Co. v. Public Service Commission</i> , 447 U.S. 530 (1980) . . . . .	7, 13
<i>Craig v. Boren</i> , 429 U.S. 190 (1976) . . . . .	15
<i>Doran v. Salem Inn, Inc.</i> , 422 U.S. 922 (1975) . . . . .	15
<i>Dunagin v. City of Oxford</i> , No. 80-3762 (5th Cir. Oct. 31, 1983) ( <i>en banc</i> ) . . . . .	14
<i>Garland B. Pugh</i> , 68 F.C.C.2d 997 (1978) . . . . .	4
<i>In re R.M.J.</i> , 455 U.S. 191 (1982) . . . . .	7, 10, 13
<i>Larkin v. Grendel's Den, Inc.</i> , 103 S. Ct. 505 (1982) . . .	16
<i>Linmark Associates, Inc. v. Willingboro</i> , 431 U.S. 85 (1977) . . . . .	8, 10
<i>Metromedia, Inc. v. City of San Diego</i> , 453 U.S. 490 (1981) . . . . .	8, 13
<i>New York State Liquor Authority v. Bellanca</i> , 452 U.S. 714 (1981) ( <i>per curiam</i> ) . . . . .	14, 15, 16

<i>Oklahoma Telecasters Association v. Crisp</i> , 699 F.2d 490 (10th Cir. 1983) .....	2, 3, 4, 5, 8, 9, 11, 12, 13, 14
<i>Police Department of Chicago v. Mosley</i> , 408 U.S. 92 (1972) .....	7, 13
<i>Queensgate Investment Co. v. Liquor Control Commis- sion</i> , 103 S. Ct. 31 (1982), <i>dismissing appeal from</i> 69 Ohio St. 2d 361, 433 N.E.2d 138 (1982) .....	5, 15
<i>Virginia Board of Pharmacy v. Virginia Citizens Con- sumer Council, Inc.</i> , 425 U.S. 748 (1976) .....	7, 8, 9
<i>Wisconsin v. Constantineau</i> , 400 U.S. 433 (1971) .....	16
<i>Ziffrin, Inc. v. Reeves</i> , 308 U.S. 132 (1939) .....	14

### Statutes

Okla. Stat. Ann. tit. 37, § 516 (West Supp. 1982) .....	2
Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, §§ 505-74 (West Supp. 1982) .....	11

### Constitutions

Okla. Const. art. 27, § 5 .....	2
U.S. Const. amend. XXI, § 2 .....	11

### Codes and Rules

17 U.S.C. § 111(c)(3) .....	4
47 C.F.R. § 76.55(b) (1982) .....	3

### Other Authorities

P. Brest, <i>Processes of Constitutional Decision-making, Cases and Materials</i> 258 (1975) .....	15
--	----

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1983

No. 82-1795

---

CAPITAL CITIES CABLE, INC.; COX CABLE OF OKLAHOMA  
CITY, INC.; MULTIMEDIA CABLEVISION, INC.; AND SAM-  
MONS COMMUNICATIONS, INC.,

*Petitioners,*

—v.—

RICHARD A. CRISP, DIRECTOR, OKLAHOMA  
ALCOHOLIC BEVERAGE CONTROL BOARD,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

---

**BRIEF OF AMICI CURIAE THE AMERICAN CIVIL  
LIBERTIES UNION AND THE AMERICAN CIVIL  
LIBERTIES UNION OF OKLAHOMA IN  
SUPPORT OF PETITIONERS**

---

**INTEREST OF AMICI CURIAE**

The American Civil Liberties Union (the "ACLU") is a nationwide, non-partisan, non-profit membership organization of over 250,000 members dedicated to the promotion and defense of the fundamental personal liberties guaranteed by the Constitution of the United States. Foremost among these liberties is freedom of speech, protected by the first and

fourteenth amendments. The ACLU has appeared frequently in this Court and in other courts, as counsel for the parties and as amicus, in cases challenging governmental actions that threaten those liberties. Because the Oklahoma Constitution and statutes at issue here would impermissibly prohibit the broadcast of nonmisleading, commercial speech about a lawful product, and would thereby greatly reduce access in Oklahoma to commercial and non-commercial information generally available in other states,<sup>1</sup> we are filing this brief amici curiae, with the consent of the parties.<sup>2</sup>

### STATEMENT OF THE CASE

The sale and consumption of alcoholic beverages is legal in the State of Oklahoma. Nevertheless, the Oklahoma Constitution and the Oklahoma Beverage Control Act impose a blanket ban on the advertising of alcoholic beverages, other than beer, within the state.<sup>3</sup>

As a result of this ban, local print media, radio and television broadcasters, and cable operators have long faced criminal prosecution if they solicited or accepted liquor advertisements. *Oklahoma Telecasters Association v. Crisp*, 699 F.2d

<sup>1</sup> Although the principal purpose of this brief is to discuss the impact of the Oklahoma prohibition on commercial speech, the ACLU also believes, for the reasons advanced by petitioners, and in the amici brief filed in support of the petitioners by the American Newspaper Publishers Association and Magazine Publishers Association, that the ban would unconstitutionally restrict non-commercial speech because it will effectively eliminate the broadcast of entire programs into Oklahoma.

<sup>2</sup> The parties' letters of consent to our participation in this case have been filed with the Clerk of Court.

<sup>3</sup> Okla. Const. art. 27, § 5; 37 Okla. Stat. Ann. tit. 37, § 516 (West Supp. 1982).

490, 492 (10th Cir. 1983).<sup>4</sup> In addition, network television affiliates were required to block out advertisements for wine before rebroadcasting network programming in Oklahoma, even though such advertisements were lawful in the states where they originated. *Id.* Until recently, however, the prohibition was not construed to apply to wine commercials included in programming relayed from outside of the state by Oklahoma cable operators. Nor was the ban applied to radio stations broadcasting into Oklahoma from outside the state, or to out-of-state publications distributed in Oklahoma. *Cable-Com General, Inc. v. Crisp*, Civ-81-290-W, slip op. at 14 (W. D. Okla. Feb. 10, 1982).

In May, 1980, the Oklahoma Attorney General issued an opinion declaring that distant signal transmissions carried over cable systems would no longer be exempted from the ban on wine advertising. *Id.*, slip op. at 8. Respondent Richard Crisp, Director of the Oklahoma Beverage Control Board, then threatened Oklahoma cable operators, including petitioners, with criminal prosecution if they continued to relay wine commercials into Oklahoma. *Id.*<sup>5</sup> Oklahoma admits that the law is intended to restrict alcohol consumption by reducing the flow of information about wine to Oklahoma residents. *Oklahoma Telecasters*, 699 F.2d at 500.

Federal regulations bar cable operators from altering any portion of the programs that they relay to their subscribers.<sup>6</sup>

<sup>4</sup> Only wine advertisements are, in practice, affected by this ban because broadcasters have generally chosen not to carry advertising for hard liquor, despite an absence of federal regulations on this issue.

<sup>5</sup> No attempt was made at that time, nor has one been made subsequently, to enforce the ban against out-of-state radio broadcasters or publications.

<sup>6</sup> Federal Communications Commission ("FCC") rules require cable operators to rebroadcast "in full, without deletion or alteration of any portion," 47 C.F.R. § 76.55(b) (1982), distant signal programming



Thus, the only way for Oklahoma cable operators to comply with the state's ban on wine commercials would be to delete entirely any program which contained such commercials. 699 F.2d at 492.

Seeking relief from this prohibitive burden, petitioner cable operators sought an injunction barring the state from enforcing its ban on wine commercials and a declaratory judgment that the ban violated their rights under the first and fourteenth amendments of the United States Constitution.<sup>7</sup>

The District Court for the Western District of Oklahoma granted the relief sought by petitioners. Rejecting the " 'highly paternalistic' approach that the state's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance," *Cable-Com General*, slip op. at 9, the district court ruled that Oklahoma could not suppress totally wine commercials which were neither false nor misleading.

The district court rejected the state's argument that its power under the twenty-first amendment superseded the cable operators' right to free speech. Applying the four part test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), it concluded that the Oklahoma ban violated the plaintiffs' first amendment rights. The ban did not directly advance the state's asserted interest in controlling alcohol abuse since beer commercials were allowed and wine advertisements carried by radio broadcasts, newspapers, and magazines which originated outside the state reached Oklahoma residents. Finally, the district court concluded that the Oklahoma ban was more extensive than neces-

---

which they import for local viewing. This rule has been interpreted by the FCC to extend to television commercials. See *Garland B. Pugh*, 68 F.C.C.2d 997 (1978). The Copyright Act of 1976 imposes similar restrictions on deletion of television commercials by cable operators. 17 U.S.C. § 111(c)(3).

<sup>7</sup> The Oklahoma Telecasters Association and several Oklahoma telecasters filed an identical suit in the same court.

sary to further the state's interest because less intrusive means of controlling alcohol consumption, including public education, were available. *Cable-Com General*, slip op. at 14-15.

The United States Court of Appeals for the Tenth Circuit reversed the judgment of the district court, holding that the Oklahoma ban did not violate the first and fourteenth amendments. *Oklahoma Telecasters*, 699 F.2d at 497. It found controlling this Court's summary dismissal in *Queensgate Investment Co. v. Liquor Control Commission*, 103 S. Ct. 31 (1982), of an appeal from a decision of the Ohio Supreme Court, 69 Ohio St. 2d 361, 433 N.E.2d 138 (1982), which upheld regulations of the Ohio Liquor Control Commission prohibiting off-premises retail price advertising by holders of certain liquor permits. The court further held that the advertising ban was a proper exercise of state authority under the twenty-first amendment.

Finally, the court purported to scrutinize the Oklahoma ban under the *Central Hudson* test. Yet because it believed substantial deference was owed to the state's power under the twenty-first amendment, the court applied little more than a rational basis test in finding that the Oklahoma prohibition directly advanced the state's interest in temperance and that it was no more extensive than necessary to meet that interest. 699 F.2d at 500-502.

### SUMMARY OF ARGUMENT

Through its ban on wine advertising, Oklahoma attempts to control the activity of its citizens by restricting their access to non-misleading information about a lawful product. This Court, however, has consistently held unconstitutional regulations that suppress commercial speech solely because of official antagonism towards the message it conveys. Under the Constitution, the government cannot attempt to regulate the conduct of its citizens by preventing them from receiving information useful to informed decision-making. The advertising ban

should therefore be struck down as a content-based restriction on speech.

The Oklahoma prohibition is also invalid under the standards that this Court has applied to test the constitutionality of restrictions on commercial speech. The state's interest in temperance is not substantial, given its failure to prohibit directly the sale and consumption of alcoholic beverages. Moreover, the ban fails to advance directly the state's asserted interest. Nothing in the record supports the conclusion that advertising stimulates overall consumption of alcohol. In any event, advertisements for wine continue to reach Oklahoma residents in sufficient quantity to belie any argument that the ban has anything more than a remote effect upon consumption. Oklahoma's asserted interest could be more directly served by a variety of restrictions which would not infringe on constitutionally protected speech. In the absence of proof that alternative restrictions would be ineffective in reducing alcohol consumption, Oklahoma's sweeping imposition on speech cannot be upheld. Finally, the prohibition is plainly overbroad because it effectively prevents the broadcast of non-commercial as well as commercial speech. If enforced, cable broadcasters in Oklahoma will have no choice but to stop airing programs that contain wine advertisements.

Respondent's contention that the twenty-first amendment overrides the first amendment interests in this case is also without merit. The twenty-first amendment gives Oklahoma no power to regulate petitioners, who are outside of the chain of liquor distribution within the state. Petitioners' first amendment rights are therefore paramount in this case.

## ARGUMENT

### I. THE FIRST AND FOURTEENTH AMENDMENTS BAR OKLAHOMA FROM REGULATING PRIVATE CONDUCT BY IMPOSING A BLANKET BAN ON THE DISSEMINATION OF INFORMATION ABOUT A LAWFUL ACTIVITY.

Through its blanket ban on wine advertisements, Oklahoma concededly attempts to regulate the lawful activities of its citizens by limiting their access to information which is neither false nor misleading. Such regulation, which prohibits speech merely because it provides information about conduct toward which the state is antagonistic, strikes at the very heart of the first amendment.

This Court has repeatedly invalidated state regulations that attempt to restrict expression because of its content, its ideas, its message, or its subject matter. *See Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 537 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972). These regulations are anathema to the first amendment which rests "on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

This Court's recent decisions in the commercial speech context affirm the traditional first amendment principle that the state may not suppress truthful speech concerning a lawful activity, as the state of Oklahoma seeks to do here, merely because of official animus towards the message it conveys.<sup>8</sup>

<sup>8</sup> The special attributes of commercial speech allow regulations directed at false or misleading information that would not be permitted if aimed at other varieties of speech. *In re R.M.J.*, 455 U.S. 191, 202-203 (1982). This degree of regulation is allowed in order to insure an unimpaired flow of truthful and legitimate commercial information. *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Coun-*

Instead, the Court has integrated commercial speech into the traditional framework of first amendment protection by stressing the importance of providing consumers with the broadest possible information about lawful products as a basis for making private economic decisions. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 764-765 (1976).<sup>9</sup>

This Court has often rejected the "highly paternalistic approach"<sup>10</sup> endorsed by the court below in sustaining the Oklahoma ban. *Bigelow v. Virginia*, 421 U.S. 809 (1975), overturned a statute barring the publication of advertisements for out-of-state abortion referral agencies, indicating that a state "may not, under the guise of exercising internal police powers, bar a citizen of another State from disseminating information about an activity that is legal in that State." *Id.* at 824-825. Similarly, in *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 773, this Court held unconstitutional a statute prohibiting pharmacists from engaging in price advertisements of prescription drugs and ruled that a state may not "completely suppress the dissemination of concededly truthful information about entirely lawful activity [simply because it is] fearful of that information." See also *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 505 (1981). This Court used the same rationale in *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977), to invalidate a

---

*cil, Inc.*, 425 U.S. 748, 771 n.24 (1976). It has been suggested that commercial speech, because of its relationship to economic profit, is more robust than other types of speech and therefore less likely to be chilled by regulations designed to insure its truthfulness. *Id.*

<sup>9</sup> Indeed, "in recent years this Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. at 566 n.9.

<sup>10</sup> *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 770.

municipal ordinance that forbade the posting of "For Sale" signs on residential property, despite the importance of Wil-  
lingboro's asserted interests.

The Oklahoma prohibition is precisely the sort of restriction which this Court repudiated in each of these cases. The advertisements at issue here are neither false nor misleading. *Oklahoma Telecasters*, 699 F.2d at 500 and n.9. Nor is the prohibition aimed at unlawful activity; the state has not chosen to regulate directly the sale or consumption of alcohol by making them illegal. Instead, the state seeks to pursue its goal of reducing alcohol consumption by suppressing commercial information about liquor.

The first amendment, as applied by the fourteenth amendment, bars Oklahoma from controlling the behavior of its citizens by restricting their access to the information they need to make an informed choice about whether to engage in a lawful activity. Instead, it requires an alternative approach. "That alternative is to assume that this information is not in itself harmful, [and] that people will perceive their own best interests if only they are well enough informed[.] . . . [T]he best means to that end is to open the channels of communication rather than to close them." *Virginia Board of Pharmacy*, 425 U.S. at 770. For this reason, Oklahoma's "highly paternalistic" prohibition is unconstitutional.

## **II. THE OKLAHOMA BAN FAILS THE REQUIREMENTS OF THE FIRST AND FOURTEENTH AMENDMENTS THAT ANY REGULATION OF COMMERCIAL SPEECH BE DIRECTLY RELATED TO A SUBSTANTIAL GOVERNMENT INTEREST AND BE NO MORE EXTENSIVE THAN NECESSARY TO MEET THAT INTEREST.**

In our judgment, this Court's decisions holding unconstitutional content-based prohibitions of nonmisleading speech about lawful activities, discussed in Part I, *supra*, require that the Oklahoma ban be struck down. Oklahoma has admitted that the purpose of this ban is to influence its residents'



decisions regarding a lawful activity. The prohibition is thus similar to those regulations struck down by this Court in *Bigelow v. Virginia*, 421 U.S. at 824-25, and *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 85, and should be governed by the same content-based analysis applied in those cases.

This Court has, however, in the context of pure commercial transactions, also applied a four part test to determine the constitutionality of regulations affecting commercial speech. See *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. at 566. The Oklahoma prohibition fails this test as well. In *Central Hudson*, this Court articulated the strict standard to be applied in determining the constitutionality of restrictions on otherwise lawful commercial speech:

"The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive."

447 U.S. at 564.<sup>11</sup> The party seeking to restrict speech carries the burden of meeting this standard.<sup>12</sup> Special scrutiny is applied where, as here, the regulation suppresses commercial

<sup>11</sup> See *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. 2875, 2881 (1983); *In re R.M.J.*, 455 U.S. at 203.

<sup>12</sup> *Bolger v. Youngs Drug Products Corp.*, 103 S. Ct. at 2882 n.20; *Central Hudson*, 447 U.S. at 570; *Linmark Associates, Inc. v. Willingboro*, 431 U.S. at 95.

speech in order to pursue a nonspeech-related policy. *Id.* at 566 n.9.<sup>13</sup>

The court below significantly weakened this standard. It looked only to whether there was a "reasonable relationship" between Oklahoma's asserted interest in reducing the consumption of alcohol and the advertising ban on wine, rather than to whether the ban "directly advanced" a substantial state interest. *Oklahoma Telecasters*, 699 F.2d at 501. It also failed to consider whether less restrictive alternatives to the ban were available, *id.* at 501-02, and simply assumed that Oklahoma's interest in temperance is substantial.

**A. Oklahoma's Interest in Temperance is Neither Substantial Nor Directly Advanced By Its Ban on Wine Advertisements.**

Throughout this litigation, Oklahoma has contended that its ban on wine advertisements is intended to reduce the consumption of liquor. The twenty-first amendment<sup>14</sup> gives the states the power to regulate the sale of alcoholic beverages and to ban them altogether. Yet Oklahoma has chosen not to advance its interest by prohibiting the sale and consumption of alcoholic beverages.<sup>15</sup> Having made this decision, Oklahoma cannot now argue that reduction of alcohol consumption is so important that it overrides petitioners' first and fourteenth amendment interests. *See Central Hudson*, 447 U.S. at 564.

Moreover, whatever Oklahoma's interests in promoting temperance, its ban on wine advertising fails to advance directly

<sup>13</sup> See discussion in Part I, *supra*.

<sup>14</sup> The twenty-first amendment provides, in relevant part:  
"The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

U.S. Const. amend. XXI, § 2.

<sup>15</sup> See Oklahoma Alcoholic Beverage Control Act, Okla. Stat. Ann. tit. 37, §§ 505-74 (West Supp. 1982).



that interest. The Court below simply assumed that because advertising is believed to increase sales, Oklahoma's prohibition against wine advertising is "reasonably related to reducing the sale and consumption of those beverages and their attendant problems." *Oklahoma Telecasters*, 699 F.2d at 501. The court's application of a reasonable relationship test ignored the constitutional requirement that "[t]he limitation on expression must be designed carefully to achieve the State's goal." *Central Hudson*, 447 U.S. at 564. "[T]he regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Id.* Any direct relationship between Oklahoma's asserted interest in temperance and the means of accomplishing that goal is purely speculative.

First, nothing in the record substantiates the court's assumption that liquor advertising stimulates overall consumption rather than simply increasing the individual advertiser's market share or brand loyalty. Second, banning advertisements in one medium cannot advance any governmental interest when the same information reaches Oklahoma residents through other media sources: radio broadcasts originating outside of the state transmit wine advertisements; newspapers and magazines published outside the state carry advertisements for wine and distilled spirits; and network television and cable operators have always broadcasted beer commercials. Given the amount of advertising already reaching Oklahoma residents, the state's ban on wine advertisements provides, at best, only "remote" and "ineffective" support for its goal of encouraging temperance. *See id.* at 564.

#### **B. Oklahoma's Advertising Ban Is More Extensive Than Necessary To Fulfill Any Interest in Temperance.**

Under the *Central Hudson* test, Oklahoma's ban on wine advertisements cannot survive if its interest in temperance could be served as well by a more limited restriction on commercial speech. *Central Hudson*, 447 U.S. at 564. The Court below erred in two respects in applying this prong of the *Central Hudson* test. First, it ignored the prohibition's broad

impact on cable operators and their audiences. If enforced, the advertising ban would require cable operators to delete entirely any program containing wine commercials.<sup>16</sup> The news and entertainment programs thus barred are precisely the type of speech given full first amendment protection.<sup>17</sup>

Second, the court below failed to consider any of the possible alternatives to Oklahoma's total ban. *Oklahoma Telecasters*, 699 F.2d at 502. Other methods of reducing alcohol consumption exist that would not restrict the first amendment rights of broadcasters and listeners. Oklahoma could disseminate information regarding the dangers of alcohol consumption; it could impose stricter age controls on who can drink alcoholic beverages, or when and where such beverages can be served; or it could simply ban the sale and consumption of alcohol within the state. None of these alternatives would restrict either commercial or non-commercial speech in any way. Each would more directly accomplish the goal of reducing alcohol consumption.

Yet Oklahoma has chosen none of these alternatives, nor has it offered any justification for its failure to do so. In the absence of a showing that any of these means would be ineffective in reducing the consumption of alcohol, Oklahoma's sweeping restriction on speech cannot be allowed to stand. See *In re R.M.J.*, 455 U.S. at 207; *Central Hudson*, 447 U.S. at 571.

<sup>16</sup> See note 6, *supra*.

<sup>17</sup> See *Metromedia, Inc. v. City of San Diego*, 453 U.S. at 515; *Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. at 537-8; *Police Dept. of Chicago v. Mosley*, 408 U.S. at 96.

### III. THE TWENTY-FIRST AMENDMENT DOES NOT OVERRIDE THE PETITIONERS' FIRST AND FOURTEENTH AMENDMENT INTERESTS IN CARRYING ADVERTISEMENTS FOR WINE.

The court below upheld Oklahoma's ban on wine advertisements because it believed that states are owed increased deference when acting pursuant to the twenty-first amendment. *Oklahoma Telecasters*, 699 F.2d at 501.<sup>18</sup> In so holding, the court gave unprecedented weight and breadth to the twenty-first amendment. Its decision is simply inconsistent with this Court's prior decisions.

The twenty-first amendment, by its terms, gives states control over the "transportation or importation" of intoxicating liquor into their territories. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980). It gives states the power to prohibit the manufacture, transportation, sale and possession of liquor within their boundaries, *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939), and to regulate the times, places and circumstances under which liquor may be sold. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1981) (per curiam). Yet nothing in the twenty-first amendment gives states the power to regulate the speech of entities not involved in the transportation or importation of alcohol within a particular state. It has been construed to apply only to entities licensed to manufacture,

18 The United States Court of Appeals for the Fifth Circuit likewise relied heavily upon the twenty-first amendment in upholding Mississippi's ban on liquor advertising which originated within the state. See *Dunagin v. City of Oxford*, No. 80-3762 (5th Cir., Oct. 31, 1983) (*en banc*). The court purported to apply the four-part *Central Hudson* test, but held that the presumption of validity under the twenty-first amendment "establish[es] the balance in favor of the state . . . ." *Dunagin, supra*, slip op. at Part III.C. Significantly, a majority of the *en banc* court disagreed with the "mischievous and insidious" extension of the twenty-first amendment. *Id.* (Williams, J. concurring); *id.* (Gee, J., dissenting and relying on the panel's original opinion at 701 F.2d 314).

distribute, transport or sell liquor. *See id.* at 716; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975).<sup>19</sup>

In this case, Oklahoma attempted to extend its power under the twenty-first amendment beyond the regulation of the sale of liquor and beyond entities engaged in its transportation or importation. Indeed, its prohibition affects national advertising with no direct relationship to the sale of alcohol within Oklahoma. No basis exists for such an extension of power either in the terms of the twenty-first amendment itself or in the decisions of this Court.<sup>20</sup>

Moreover, while the twenty-first amendment creates an exception to the normal operation of the commerce clause, *Craig v. Boren*, 429 U.S. 190, 206 (1976), it is of little relevance to other constitutional provisions. As this Court commented in *Craig v. Boren*, "Neither the text nor the history of the Twenty-First Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned." *Id.*, quoting P. Brest, *Processes of Constitutional Decision-making, Cases and Materials* 258 (1975).

Thus, gender based discrimination in the legal drinking age denies equal protection despite the twenty-first amendment. *Craig v. Boren*, 429 U.S. at 210. Neither has the amendment been allowed to qualify the scope of due process rights.

19 *Queensgate Investment Co. v. Liquor Control Comm.*, 103 S. Ct. 31 (1982), raised no substantial federal question because its advertising ban applied only to off premises, retail price per drink advertising by certain retail liquor permit holders, and was thus within the state's power under the twenty-first amendment. *See id.* at 69 Ohio St. 2d 361, 433 N.E. 2d 138.

20 As this Court has stated in interpreting the scope of the amendment, "[w]e should not . . . lose sight of [its] explicit grant of authority." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. at 107. And this explicit grant of authority applies only to the "transportation or importation . . . for delivery or use." *Id.* at 106.

*Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971). And in *Larkin v. Grendel's Den, Inc.*, 103 S. Ct. 505 (1982), this Court observed that a state "may not exercise its power under the Twenty-First Amendment in a way which impinges upon the Establishment Clause of the First Amendment." *Id.* at 510 n. 5. The same thing may be said for the speech clause.

Those cases giving the states broad power under the twenty-first amendment to regulate expressive conduct have been limited to situations involving conduct within establishments licensed to sell liquor. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972).<sup>21</sup> This case does not involve an establishment which sells liquor, nor conduct within such an establishment. It is therefore outside the scope of the twenty-first amendment. The court below erred in upholding Oklahoma's unprecedented extension of its power under the twenty-first amendment at the expense of petitioners' rights under the first and fourteenth amendments.

<sup>21</sup> In *Bellanca*, this Court held that the State had the power, under the twenty-first amendment, to ban the sale of liquor on premises where topless dancing occurs. 452 U.S. at 717. In *California v. La Rue*, the facial constitutionality of a statute prohibiting acts of "gross sexuality" in establishments licensed by the State to serve liquor was upheld as within the State's power under the twenty-first amendment. 409 U.S. at 118.

## CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Tenth Circuit and hold that the Oklahoma prohibition against wine advertisements is unconstitutional under the first and fourteenth amendments.

Respectfully submitted,

Of Counsel:

BURT NEUBORNE

CHARLES S. SIMS

The American Civil

Liberties Union

132 West 43rd Street

New York, New York 10036

(212) 944-9800

JOHN G. KOELTL\*

JAMES C. GOODALE

MARTHA J. OLSON

Debevoise & Plimpton

875 Third Avenue

New York, New York 10022

(212) 909-6000

Attorneys for the American  
Civil Liberties Union  
and the American Civil  
Liberties Union of  
Oklahoma, *amici curiae*

November 17, 1983

\*Counsel of Record for  
*amici curiae*